Filed 10/2/03 P. v. Thornton CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICIA LYNN THORNTON,

Defendant and Appellant.

F041786

(Super. Ct. No. SC084554B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Patricia Lynn Thornton appeals her convictions and sentence for second degree burglary and receiving stolen property. She contends the trial court erred prejudicially in instructing the jury with CALJIC No. 2.15, abused its discretion in denying probation, and erred when it failed to stay imposition of punishment on the

receiving stolen property conviction pursuant to Penal Code[1] section 654. We will direct the preparation of an amended abstract of judgment to reflect the section 654 stay and in all other respects affirm the judgment.

PROCEDURAL AND FACUTAL SUMMARY

A jury convicted Thornton of second degree burglary and receiving stolen property. The trial court denied Thornton's request for probation and sentenced her to a term of two years in state prison.

At trial it was established that Richard Bean observed Thornton and Cheryl Russell coming out of a warehouse rented by his father, William Bean, and getting into a blue Chevy pickup truck at around 7:50 a.m. on April 7, 2002.

The sheriff's department was notified and Deputy Keene determined that the pickup truck was registered to Thornton's daughter. Keene called and spoke to Thornton, who told the deputy that the truck had been loaned to a woman she identified as Cheryl White, although Cheryl White's true name is Cheryl Russell. Thornton refused to give Keene a phone number for Russell and Keene asked Thornton to have Russell contact him. Keene also asked Thornton to meet him at the warehouse.

Approximately 10 minutes later, Thornton and Russell showed up at the warehouse. Richard Bean identified the women as the two he saw leaving the warehouse. Keene asked where the Chevy pickup was and the women responded that it was at Russell's house. When Keene asked them to get the truck to the warehouse, Russell called her husband and he drove it to the warehouse location. William Bean identified several items in the Chevy truck as items belonging to him and missing from the warehouse.

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[1] All further statutory references to code sections are to the Penal Code unless otherwise specified.

Keene and others then went to the Russells' home where William Bean identified additional items taken from the warehouse. Further items recovered from Thornton's home were identified by William Bean as property taken from the warehouse.

Russell pled guilty and testified against Thornton. Russell testified that she and Thornton had been going to the warehouse on a weekly basis for about two months and removing items. They were planning to have a yard sale and sell the items taken from the warehouse. On April 7, she and Thornton had returned to the warehouse to take some filing cabinets.

Thornton testified that she never went into the warehouse and never took any items from the warehouse. Thornton also testified that the items found in the Chevy pickup and a number of items found in her home that were claimed by William Bean actually belonged to her. As for other items stolen from the warehouse and found in her home, Thornton claimed her boyfriend, who was currently out of state, had left them there.

DISCUSSION

I. CALJIC No. 2.15

The jury was instructed with the 2000 revision to CALJIC No. 2.15, possession of stolen property. In relevant part, that instruction provided that if the jury found Thornton was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that Thornton is guilty of burglary; there must be corroborating evidence.

Thornton challenges the giving of CALJIC No. 2.15 on two grounds: (1) that she did not have knowing possession of the items, and (2) that it permits an inference of guilt without a rational basis. We disagree with her contentions.

Conscious Possession

Thornton argues that the jury should not have been instructed with CALJIC No. 2.15 because the issue of whether Thornton knowingly possessed stolen property was in

dispute. A careful reading of Thornton's argument, however, discloses that she misinterprets the term "conscious possession." Thornton did not dispute at trial, or on appeal, that she had possession of the items claimed by William Bean to have been stolen. Thornton disputed at trial that the items were stolen, asserting that most of the items claimed by William Bean in fact belonged to her.

The term "conscious possession" does not mean awareness that the items are stolen property; it refers to awareness by a defendant that he or she was in possession of particular property. (*People v. McFarland* (1962) 58 Cal.2d 748, 754; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Thornton admitted conscious, knowing possession when she claimed items were owned by her and not William Bean.

Due Process

Thornton contends that the language of CALJIC No. 2.15 violates the Fourteenth Amendment's guarantee of due process because it permits the jury to draw an inference without an adequate basis in fact. As stated by Thornton, "the instruction impermissibly permitted the jury to find appellant guilty of the charged offense of burglary merely because she had possession of the stolen property."

Thornton's contention was rejected, however, in *People v. Johnson* (1993) 6 Cal.4th 1, 37 and *People v. Holt* (1997) 15 Cal.4th 619, 676-677, and again recently in *People v. Yeoman* (2003) 31 Cal.4th 93, 131. As stated in *Yeoman*, CALJIC No. 2.15 does not violate due process because the instruction permits, but does not require, the jury to draw the inference described therein. (*People v. Yeoman, supra,* 31 Cal.4th at p. 131.)

If Thornton's contention is that the permissive inference violates due process in this case, we reject that contention. A permissive inference "violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315.) The evidence corroborating Thornton's conscious possession of the property included: (1) Richard Bean's identification of Thornton as one of the women he saw

walking out of the warehouse, in combination with Thornton's denial that she was ever in the warehouse; (2) Thornton providing inaccurate information to Keene when she falsely stated the Chevy truck had been loaned to a Cheryl White; and (3) Russell's testimony that she and Thornton entered the warehouse on several occasions and removed items from the warehouse with the intent to sell them. In view of this corroborating evidence, reason and common sense justify the conclusion that Thornton was guilty of second degree burglary. (*People v. Yeoman, supra,* 31 Cal.4th at pp. 131-132.)

II. Denial of Probation

Thornton contends the trial court abused its discretion when it relied upon improper factors and denied her request for probation. In denying probation, the trial court cited Thornton's numerous prior convictions, her prior prison term, the amount of the loss, and her "highly questionable" testimony at trial. The trial court then noted that in light of the numerous aggravating factors, the upper term might be the appropriate term. Because of the elapsed time since completion of her prior prison term, however, the court was imposing the midterm of two years.

An appellate court affirms a sentence unless there is a clear showing the sentencing choice was arbitrary or irrational. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) Pursuant to California Rules of Court,[2] rule 4.420(a), the midterm of imprisonment, not probation, is the indicated sentence unless factors in aggravation or mitigation justify the upper or lower term.

Rule 4.414 sets forth the criteria to be considered in determining whether to grant probation. Contrary to Thornton's assertion, the factors cited by the trial court were not considered improperly and the court's sentencing choice is not irrational.

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[2] All further references to rules are to the California Rules of Court unless otherwise specified.

Thornton contends that the trial court should not have considered her prior prison term in deciding whether to grant or deny probation because it was mitigated by satisfactory performance on parole and it was more than five years old and thus could not qualify as an enhancement under section 667.5. The trial court did consider prior satisfactory performance on parole in determining Thornton's sentence. (Rule 4.414(b)(2).)

Additionally, rule 4.414(b)(1) specifically provides that a defendant's record of criminal conduct shall be considered. Thornton's criminal history prior to the two current offenses includes five prior convictions dating from 1989 to 1992, as well as a term of imprisonment. Further, rule 4.414 does not specify that prison terms more than five years old be omitted from consideration.

Moreover, prior prison terms, criminal history and performance on parole are all factors to be considered in determining whether to impose the mid, upper or lower term of imprisonment and were considered by the trial court for that purpose. (Rules 4.421(b)(2), (3), (5) & 4.423(b)(1), (6).)

The amount of the loss is also a factor the trial court is permitted to utilize in determining a sentence. (Rules 4.414(a)(5) & 4.421(a)(9).) The victim, William Bean, valued the dollar amount of his loss at $101,000. Thornton conceded to a value of $100,000.

With respect to Thornton's contention that the trial court improperly considered a lack of remorse, she is mistaken. The trial court did not state that it was considering her "highly questionable" testimony as evidence of lack of remorse. Rather, the trial court cited her highly questionable testimony as one of several factors supporting the court's conclusion that she will be a danger to others if not imprisoned. Whether Thornton is a danger to others is an appropriate factor to consider in determining whether to grant probation. (Rule 4.414(b)(8).)

Even if the trial court's statements were viewed as considering Thornton's lack of remorse, pursuant to rule 4.414(b)(7) remorse is a factor to consider in determining whether to grant or deny probation. Lack of remorse can be considered because, although Thornton denied taking items from the warehouse, the evidence against her was overwhelming. She was seen leaving the warehouse; property belonging to William Bean was in her possession; and Russell testified that she and Thornton had been taking items from the warehouse for several weeks. Lack of remorse is properly considered in denying probation even when a defendant does not admit guilt where, as here, the evidence of guilt is overwhelming. (*People v. Leung* (1992) 5 Cal.App.4th 482, 507-508.)

Contrary to Thornton's assertion, the trial court's denial of probation was not irrational or arbitrary. The record reflects that the imposition of the midterm of imprisonment was a well-reasoned decision on the part of the trial court.

III. Section 654

The trial court imposed the midterm of two years' imprisonment on the second degree burglary conviction and a concurrent term on the receiving stolen property conviction. (§§ 460, subd. (b), 496, subd. (a).) Thornton contends the trial court erred when it imposed, rather than stayed, the term for the receiving stolen property conviction. The People concede the error.

Section 654 bars multiple punishments for a single or indivisible course of conduct. Although the evidence established that Thornton and Russell entered the warehouse on several occasions and removed property each time, Thornton was charged with only a single count each of second degree burglary and receiving stolen property. Therefore, the term imposed on count 2, receiving stolen property, should have been stayed pursuant to section 654. (*People v. Allen* (1999) 21 Cal.4th 846, 864-867.)

DISPOSITION

The sentence is modified to reflect that any punishment for the count 2 offense, receiving stolen property, is stayed pursuant to section 654. In all other respects the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment.

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CORNELL, J.

WE CONCUR:

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DIBIASO, Acting P.J.

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BUCKLEY, J.